No. 85-540

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

**UNITED STATES OF AMERICA ex rel.
JAMES D. COLE, SR. and JAMES D. COLE, JR.,**

Petitioners,

vs.

**STEVEN McEVERS, Warden,
LINCOLN CORRECTIONAL CENTER,**

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioners were placed in double jeopardy when they were retried for solicitation to commit murder subsequent to a jury being unable to reach a verdict on that count, although the jury acquitted them of a different count of solicitation to commit murder.
2. Whether the lower court properly applied this court's decision in *O'Brien v. Skinner,* 414 U.S. 524 (1974).

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OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit which affirmed the denial of a writ of habeas corpus by the United States District Court for the Central District of Illinois was an unpublished order dated May 23, 1985. The order has been submitted to this Court as an appendix to the Petition for Writ of Certiorari, and, therefore, is not contained in the Brief in Opposition.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On January 15, 1980, the Peoria County, Illinois, Grand Jury returned a three count indictment against the petitioners. Count I alleged that petitioners committed the offense of solicitation to commit murder in that they requested William Haley to murder Robert Jones. Count II alleged petitioners committed the offense of solicitation to commit murder in that they encouraged William Haley to murder Robert Jones. Finally, Count III alleged petitioners committed the offense of conspiracy to commit murder. Counts I and II were predicated upon *Ill. Rev. Stat.* ch. 38, § 8-1(a) which provides that "[a] person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense."

Following a jury trial the petitioners were acquitted on Counts I and III. Insofar as the jury was unable to reach a verdict on Count II, the trial court declared a mistrial as to that count.

Petitioners subsequently moved to bar further proceedings on Count II on the ground that a retrial would place the petitioners in double jeopardy. The court denied the motion and petitioners were retried and convicted of

solicitation to commit murder as charged in Count II of the indictment.

From the conviction petitioners took a direct appeal to the Illinois Appellate Court, Third District. The court reversed the convictions by holding that a retrial of petitioners on Count II violated the double jeopardy provisions of the Federal and State Constitutions. *People v. Cole*, 98 Ill.App.3d 309, 424 N.E.2d 393 (3d Dist. 1981). The Illinois Supreme Court subsequently reversed the judgment of the appellate court and affirmed petitioners' convictions. *People v. Cole*, 91 Ill.2d 172, 435 N.E.2d 490 (1982). This Court denied their petition for a writ of certiorari to review the decision of the Illinois Supreme Court. *Cole v. Illinois*, 459 U.S. 863 (1982).

Petitioners then filed a petition for writ of habeas corpus in the United States District Court for the Central District of Illinois alleging that the retrial of petitioners on Count II of the indictment violated the protection against double jeopardy. The district court rejected the claim and denied petitioners habeas corpus relief.

Petitioners appealed the denial of a writ of habeas corpus to the United States Court of Appeals for the Seventh Circuit. The court in an unpublished order affirmed the judgment of the district court. *United States ex rel. Cole v. McEvers*, 767 F.2d 925 (7th Cir. 1985). From this judgment of the Seventh Circuit, petitioners bring the instant petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit insofar as the questions presented for review involve an application of *Illinois v. Somerville*, 410 U.S. 458 (1973) and *O'Brien v. Skinner*, 414 U.S. 524 (1974). Although petitioner advances two questions for review, the questions presented involve application of the well-defined decisional law of this Court to the facts of this case. Respondent maintains further review of this cause is unnecessary because the decision of the lower court does not depart from established precedent. The court below fully considered and correctly decided the issues.

I.

PETITIONERS WERE NOT PLACED IN DOUBLE JEOPARDY WHEN THEY WERE RETRIED FOR SOLICITATION TO COMMIT MURDER SUBSEQUENT TO A JURY BEING UNABLE TO REACH A VERDICT ON THAT COUNT, ALTHOUGH THE JURY HAD ACQUITTED THEM OF A DIFFERENT COUNT OF SOLICITATION TO COMMIT MURDER.

Petitioners make the claim that the acquittal on Counts I and II of the indictment bars further prosecution on Count II under the double jeopardy provision of the United States Constitution. (Petition for Writ of Certiorari at 9) The law to be applied to this case was first articulated by this Court in 1824 and has since remained unchanged. Respondent submits where the jury was unable to reach a verdict on Count II of the indictment,

retrial of the petitioners on that Count did not violate double jeopardy notwithstanding petitioner's earlier acquittal on Counts I and III.

The double jeopardy clause of the fifth amendment provides three separate guarantees which protect against 1) a second prosecution for the same offense after an acquittal; 2) a second prosecution for the same offense after a conviction; and 3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). However, there is no double jeopardy bar in the retrial of a defendant where the first trial results in a mistrial because a jury is unable to reach a verdict. *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). A mistrial after a jury has been unable to reach a verdict is no bar to a subsequent retrial on the same charges. In *Perez*, this Court set forth the standards for determining whether a retrial, following a declaration of a mistrial over a defendant's objection, constitutes double jeopardy within the meaning of the Fifth Amendment. This Court held that the failure of the jury to agree on a verdict of either acquittal or conviction did not bar retrial of the defendant.

Most recently, this Court in *Richardson v. United States*, ____ U.S. ____, 104 S.Ct. 3081 (1984) held that retrial of a defendant was not barred by principles of double jeopardy. Reasoning from the generally recognized principle that the double jeopardy clause by its terms applies only if there has been some event which terminates the original jeopardy, this Court stated:

> [A] trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected. The Government, like a defendant, is entitled to resolution of the case by a verdict from the jury, and jeopardy does not terminate when the jury is discharged be-

> cause it is unable to agree. Regardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial.

Id. at ___, 104 S.Ct. at 3086.

In the case at bar, the lower court in its order affirming the district court's denial of a writ of habeas corpus relied on *Illinois v. Somerville*, 410 U.S. 458 (1973) to hold that a retrial on the count as to which the trial court declared a mistrial did not constitute double jeopardy. The court's holding is fully consistent with *Somerville*, *United States v. Perez*, and *Richardson v. United States*. There simply is no constitutional bar to the retrial of petitioners on the count of solicitation to commit murder that resulted in a mistrial following an acquittal on another count of solicitation to commit murder.

The effect of the jury's acquittal of petitioners on the charge of solicitation by requesting the murder of Robert Jones was to bar retrial on that count. However, that acquittal had no effect on the subsequent retrial of petitioners on the remaining count of solicitation to commit murder by encouraging William Haley to murder Robert Jones following the jury's inability to reach a verdict as to this count.

To further bolster petitioner's claim, they argue "[s]ince both counts amount to merely different theories of the same offense . . . double jeopardy principles mandate that the acquittal on Count I operates as a bar to retrial on Count 2 following the mistrial." (Petition for Writ of Certiorari at 9) This position is without support where the Illinois Supreme Court held that under Illinois law "[r]equest and encouragement are two distinctive methods by which the offense of solicitation can be committed and

reflect the legislature's intent to include varying degrees of involvement on the part of the solicitor." *People v. Cole*, 91 Ill.2d 172, 177, 435 N.E.2d 490, 492 (1982). Thus, the jury's inability to reach a verdict on Count II, solicitation by encouragement, was not an implied acquittal as to that count where the offenses charged in the indictment were not in law and in fact the same offense.

II.

THE LOWER COURT PROPERLY APPLIED THIS COURT'S DECISION IN *O'BRIEN v. SKINNER*, 414 U.S. 524 (1974).

Finally, petitioners argue that the lower court improperly applied this Court's decision in *O'Brien v. Skinner*, 414 U.S. 524 (1974). (Petition for Writ of Certiorari at 13-14) Respondent maintains the petition for writ of certiorari should not be granted to review the lower court's application of *O'Brien v. Skinner*.

The lower court in affirming the denial of habeas corpus relief by the district court held:

> The District Court correctly concluded that federal courts follow the construction of a State statute adopted by the highest court of the State. As the Supreme Court said in *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974), "it is not our function to construe a state statute contrary to the construction given it by the highest court of a State."

(Petition for Writ of Certiorari, Appendix at 2a) Consequently, the Seventh Circuit followed the Illinois Supreme Court's construction of the solicitation statute that solicitation by request and solicitation by encouragement are separate crimes and may be charged in separate counts of an indictment.

This Court in *Missouri v. Hunter*, 459 U.S. 359 (1983); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n. 4 (1982); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 n. 9 (1978); and, *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256 (1974) reaffirmed the position taken in *O'Brien v. Skinner* that federal courts are bound to accept a state court's construction of a state statute. Although the Seventh Circuit was bound by the Illinois Supreme Court's interpretation of the solicitation statute under *O'Brien v. Skinner*, the court was not bound by the Illinois court's legal conclusion with respect to the issue of whether double jeopardy prevented petitioners' retrial. Consequently, the Seventh Circuit applied double jeopardy principles as articulated by this Court in *Illinois v. Somerville*, 410 U.S. 458, 463 (1973) to reach its own conclusion on the issue. Further review by this Court of the lower court's application of these principles is not required.

CONCLUSION

For the above advanced reasons, respondent respectfully requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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